

SNELL & WILMER  
L.L.P.  
350 SOUTH GRAND AVENUE  
SUITE 2600  
TWO CALIFORNIA PLAZA  
LOS ANGELES, CALIFORNIA 90071

SNELL & WILMER L.L.P.  
Philip J. Graves (SBN 153441)  
pgraves@swlaw.com  
Greer N. Shaw (SBN 197960)  
gshaw@swlaw.com  
Deborah S. Mallgrave (SBN 198603)  
dmallgrave@swlaw.com  
350 South Grand Avenue, Suite 2600  
Two California Plaza  
Los Angeles, CA 90071  
Telephone: (213) 929-2500  
Facsimile: (213) 929-2525  
  
Attorneys for Plaintiff  
James R. Glidewell Dental Ceramics, Inc.  
d/b/a Glidewell Laboratories

UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA  
SOUTHERN DIVISION

JAMES R. GLIDEWELL DENTAL  
CERAMICS, INC. dba GLIDEWELL  
LABORATORIES, a California  
corporation,

Plaintiff,

vs.

KEATING DENTAL ARTS, INC.,

Defendant.

AND RELATED  
COUNTERCLAIMS.

Case No. SACV11-01309-DOC(ANx)

**JAMES R. GLIDEWELL DENTAL  
CERAMICS, INC.'S NOTICE OF  
MOTION AND MOTION IN LIMINE  
#5 TO EXCLUDE EVIDENCE OF  
CERTAIN TRADEMARK OFFICE  
PROCEEDINGS; MEMORANDUM  
OF POINTS AND AUTHORITIES**

Hearing

Date: January 28, 2013  
Time: 8:30 a.m.  
Ctrm: 9D, Hon. David O. Carter

Pre-Trial Conf.: January 28, 2013  
Jury Trial: February 26, 2013

**TO THE DISTRICT COURT AND PARTIES IN INTEREST:**

**PLEASE TAKE NOTICE** that, by submission to the Honorable David O. Carter of the United States District Court for the Central District of California, Plaintiff James R. Glidewell Dental Ceramics, Inc. (“Glidewell”), hereby moves the court *in limine* for an order to exclude evidence of, and argument regarding, the parties’ filings and the U.S. Patent and Trademark Office’s (“PTO”) actions in Proceeding No. 92056050 and Proceeding No. 91202891, including, but not limited to (a) Defendant Keating Dental Arts, Inc.’s (“Keating” or “Defendant”) Petition for Cancellation of Glidewell’s registered BruxZir trademark, (b) Keating’s Opposition to Glidewell’s application to register the BruxZir mark for dental ceramics, and (c) the PTO’s suspensions of both proceedings pending the outcome of the instant action (collectively, “PTO Proceedings”). As detailed in the accompanying memorandum, the PTO Proceedings, *as evidence*, are irrelevant to any issues to be tried to the jury. *See* Fed. R. Evid. 401, 402. Even if the PTO Proceedings had some probative value *as evidence* – which they do not – their probative value would be “substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence.” Fed. R. Evid. 403. For this additional reason, the Court should preclude Keating from proffering to the jury evidence or argument as to the PTO Proceedings.

This motion is made following the Local Rule 16-2 Meeting of Counsel Before Final Pretrial Conference and the discussion of evidentiary matters pursuant to Local Rule 16-2.6, which took place on December 19, 2012 (in-person meeting) and Local Rule 7-3 Conference of Counsel Prior to Filing of Motions, which took place on December 31, 2012 (telephonically) and continued on January 2, 2013 (telephonically). The parties’ counsel discussed the issues presented by this Motion, but could not reach agreement.

This motion is based on this notice of motion and the attached memorandum

1 of points and authorities, the pleadings and records on file with the Court in this  
2 action, and on such other and further argument and evidence as the Court may  
3 properly receive.

4 Dated: January 17, 2013

SNELL & WILMER L.L.P.

6  
7 By: s/Greer N. Shaw

Philip J. Graves

Greer N. Shaw

Deborah S. Mallgrave

10 Attorneys for Plaintiff

James R. Glidewell Dental Ceramics, Inc.

dba Glidewell Laboratories

SNELL & WILMER

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# MEMORANDUM OF POINTS AND AUTHORITIES

## I. INTRODUCTION

The Court should exclude from evidence at trial the parties' filings with, and actions taken by, the U.S. Patent and Trademark Office ("PTO") in connection with Glidewell's BruxZir mark. In particular, the Court should exclude Keating's Petition for Cancellation, filed with respect to Glidewell's registered BruxZir mark (registered for certain dental restoration products, such as crowns and bridges). The Court also should exclude evidence of the Opposition that Keating filed in an attempt to prevent Glidewell's registration of the BruxZir mark for a different class of products, dental ceramics. Documentary and testimonial evidence of the Petition for Cancellation and the Opposition, and any attorney argument premised thereon, should be excluded from evidence because they are irrelevant to the parties' claims and defenses at issue in this case. Even if the Petition for Cancellation and the Opposition might be relevant, they should still be excluded because the risk of unfair prejudice and jury confusion substantially outweighs any probative value.

Moreover, the Court should exclude evidence of the PTO's decisions to suspend proceedings on Keating's Petition for Cancellation and Opposition (collectively, "PTO Proceedings"), pending the outcome of this litigation. These actions, and others in the PTO Proceedings, say nothing about the validity of the BruxZir mark or the merits of Keating's purported defenses. Exposing the jury to irrelevant evidence of collateral administrative proceedings carries a substantial risk of prejudice and confusion because, among other things, the jury may wrongly conclude that its decision will be second guessed –or corrected if erroneous – by the PTO.

## II. STATEMENT OF FACTS

On June 17, 2009, Glidewell applied for a registration of its BruxZir mark for dental bridges; dental caps; dental crowns; dental inlays; dental onlays; dental prostheses, and the PTO issued the registration on January 19, 2010. (Dkt. #90-1,

1 Ex. L (Allred Decl., ¶¶ 4-5); Dkt. 90-19, Exs. 59-60)

2 On May 27, 2011, Glidewell applied to register the BruxZir mark for a  
3 different class of products, dental ceramics. (Dkt. #90-19, Ex. 61) Keating filed  
4 Trademark Opposition No. 91202891 on December 7, 2011 to contest Glidewell's  
5 trademark registration application to include dental ceramics in the class of goods  
6 covered by the registered BruxZir mark. On February 3, 2012, the PTO granted  
7 Keating's motion to suspend Opposition No. 91202891 pending final determination  
8 of the instant case.

9 On August 17, 2012, Keating filed a Petition for Cancellation, Proceeding  
10 No. 92056050, with the PTO to cancel Glidewell's registered BruxZir mark. (Dkt.  
11 #58-1, Ex. A) On October 26, 2012, the PTO granted Keating's motion to suspend  
12 the Proceeding No. 92056050 pending the determination of the instant action.

13 Despite their lack of relevancy, Keating has sought to inject the Petition for  
14 Cancellation and the Opposition into this litigation at various stages. In the  
15 Declaration of Rustin Mangum in support of Motion and Motion for an Order to  
16 File Answer, Affirmative Defenses and Second Amended Counterclaims, Keating  
17 proffered its Petition for Cancellation to argue that Glidewell's BruxZir mark is  
18 generic, and that relevant consumers were unlikely to be confused between BruxZir  
19 and Keating's KDZ Bruxer mark. (Dkt. #58 at 2:1-3) Keating also used  
20 Opposition No. 91202891 and the PTO's suspension of those proceedings as an  
21 exhibit in its deposition of Glidewell's General Counsel Keith Allred on October  
22 25, 2012, and has offered the same as Exhibit 128 in the joint exhibit list submitted  
23 by the parties prior to trial. (Dkt. #195)

### 24 **III. ARGUMENT**

#### 25 **A. Evidence of the PTO Proceedings is Irrelevant.**

26 Glidewell anticipates that Keating may attempt to proffer the Petition for  
27 Cancellation, the Opposition, and other items from the PTO Proceedings as  
28 evidence, and argument premised thereon, at trial. These items are irrelevant and

1 should be excluded.

2 “Relevant evidence” is “evidence having any tendency to make the existence  
 3 of any fact that is of consequence to the determination of the action more probable  
 4 or less probable than it would be without the evidence.” Fed. R. Evid. 401.

5 “Evidence which is not relevant is not admissible.” Fed. R. Evid. 402.

6 Courts have determined, pursuant to FRE 401 and 402, that PTO decisions  
 7 and pending proceedings are of limited or no relevance to trademark infringement  
 8 actions. *See, e.g., Desert European Motorcars, Ltd. v. Desert European Motorcars,*  
 9 *Inc.*, 2011 WL 3809933, at \*13-14 (C.D. Cal. Aug. 25, 2011). In *Desert European*,  
 10 the Court granted Plaintiff’s Motion to Strike Defendant’s phrase in its Answer and  
 11 Counterclaim regarding its intent to file a petition to cancel Plaintiff’s trademark.  
 12 In doing so, the Court reasoned that the phrase was “immaterial, as Defendant’s  
 13 petition to cancel . . . has now been stayed pending the outcome in this present  
 14 Action.” *Desert European*, 2011 WL 3809933, at \*14.

15 In *Coryn Group*, also a trademark infringement case, the Court granted  
 16 Plaintiff’s motion *in limine* to exclude evidence of the PTO’s decision to grant  
 17 Defendant’s petition for cancellation of Plaintiff’s registered trademark. *Coryn*  
 18 *Group II, LLC v. O.C. Seacrets, Inc.*, 2011 WL 862729, at \*1 (D. Md. Mar. 10,  
 19 2011). In doing so, the Court reasoned in part, based on FRE 401, 402, and 403,  
 20 that the relevance of the PTO’s decision is “limited because the standards  
 21 governing likelihood of confusion in registration, cancellation, or opposition  
 22 proceedings before the PTO can be different than the likelihood of confusion  
 23 standard applicable in trademark infringement actions in a district court.” *Coryn*  
 24 *Group*, 2011 WL 862729, at \*2 (citing *Levy v. Kosher Overseers Ass’n*, 104 F.3d  
 25 38, 41 (2d Cir. 1997)) (quotation marks omitted).

26 The evidence sought to be excluded here is even less relevant, and less  
 27 compelling, than that excluded in *Coryn Group*. Here, unlike in *Coryn*, there has  
 28 been no PTO decision to cancel the BruxZir mark or deny it registration. There is

1 only Keating's requests that it do so, and the PTO's administrative decision to  
2 suspend action. Moreover, the pending and incomplete PTO Proceedings will be  
3 decided upon legal standards that are different than those applied by this Court and  
4 according to precedents that are not controlling here (i.e., PTO decisions rather than  
5 Ninth Circuit law). As did the court in *Coryn*, the Court should exclude evidence  
6 of the PTO proceedings.

7 In analogous contexts, courts handling patent infringement cases commonly  
8 exclude evidence of pending patent reexamination proceedings in the PTO, on  
9 grounds that such evidence is irrelevant and has no probative value under FRE 401  
10 and 402. The PTO's decision to reexamine a patent is made after the PTO has  
11 found that a "substantial new question of patentability" has been raised as to an  
12 issued patent. 35 U.S.C. § 304; *see also Plumley v. Mockett*, 836 F. Supp. 2d 1053,  
13 1075 (C.D. Cal. 2010) (reasoning that statute requires the "PTO director to issue a  
14 reexamination order upon finding a substantial new question of patentability.")  
15 (internal quotations omitted). The PTO arrives at this decision after considering a  
16 detailed submission by the reexamination requester, including a brief and prior art.  
17 35 U.S.C. §§ 302-303. Thus, a pending reexamination is at least some evidence  
18 that a competent authority (the PTO) has questioned validity. Nevertheless,  
19 evidence of reexamination proceedings is commonly excluded as irrelevant in  
20 district court litigation involving the same patent. *See, e.g., Presidio Components,*  
21 *Inc. v. American Technical Ceramics Corp.*, 2009 WL 3822694, at \*2 (S.D. Cal.  
22 Nov. 13, 2009) (granting Plaintiff's motion to exclude from trial all evidence  
23 regarding the PTO's grant of Defendant's request for reexamination because such  
24 evidence is "irrelevant to this case" and "is not probative of unpatentability.")  
25 (citing *Hoechst Celanese Corp. v. BP Chemicals Ltd.*, 78 F.3d 1575, 1584 (Fed.  
26 Cir. 1996)); *i4i Ltd. Partnership v. Microsoft Corp.*, 670 F. Supp. 2d 568, 588 (E.D.  
27 Tex. 2009) (denying Defendant's motion for a new trial on grounds that the Court  
28 erroneously excluded evidence regarding the PTO's granting of reexamination for



1 the “simple fact that a reexamination decision . . . is not evidence probative of any  
2 element regarding any claim of invalidity.”) (citing *Procter & Gamble Co. v. Kraft*  
3 *Foods Global, Inc.*, 549 F.3d 842, 848 (Fed. Cir. 2008)); *Transamerica Life Ins.*  
4 *Co. v. Lincoln Nat. Life Ins. Co.*, 597 F. Supp. 2d 897, 904-908 (N.D. Iowa 2009)  
5 (granting Defendant’s motion *in limine* to preclude evidence of pending patent  
6 reexamination, reasoning that “evidence of incomplete patent reexamination  
7 proceedings is not admissible to prove invalidity of a patent, because it has no  
8 probative value on that issue . . .”).

9 Here, Keating’s PTO Proceedings are even less plausibly relevant than the  
10 kind of evidence excluded in these patent cases. Neither a Petition for Cancellation  
11 of a registered trademark, nor an Opposition to a trademark application, carries  
12 even a faint aroma of official action. They are actions by adversely-interested third  
13 parties, not the government. Here, they say nothing about the validity or  
14 registerability of Glidewell’s BruxZir mark, which carries a strong presumption of  
15 validity by virtue of its registration (as to dental restorations). *Zobomondo Enter.,*  
16 *LLC v. Falls Media, LLC*, 602 F.3d 1108, 1113 (9th Cir. 2010) (holding that a  
17 “federal registration . . . entitles the plaintiff to a ‘strong presumption’ that the mark  
18 is a protectable mark.”) (emphasis added); *Reno Air Racing Ass’n, Inc. v. McCord*,  
19 452 F.3d 1126, 1135 (9th Cir. 2006) (“[R]egistered marks are endowed with a  
20 strong presumption of validity . . .”). As for the PTO’s decisions to suspend  
21 proceedings, again, these actions says nothing substantive about the validity of  
22 Glidewell’s registered BruxZir mark or whether its second application for a BruxZir  
23 registration (for dental ceramics) should issue. They were purely administrative  
24 actions made to avoid duplication of efforts (by the PTO and the Court) and  
25 potential conflicted decision making between two government bodies.

26 In sum, the Court should exclude evidence and argument regarding the  
27 Petition for Cancellation, the Opposition, and other items from the related PTO  
28 Proceedings because they are irrelevant to and are not probative of any claims or



1 defenses made by either party in this case.

2 **B. Any Probative Value of the PTO Proceedings is Substantially**  
 3 **Outweighed by the Danger of Unfair Prejudice and Jury Confusion.**

4 This Court has broad discretion pursuant to FRE 403 to exclude relevant  
 5 evidence “if its probative value is substantially outweighed by the danger of unfair  
 6 prejudice, confusion of the issues, or misleading the jury.” Fed. R. Evid. 403;  
 7 *Monotype Corp. PLC v. Int’l Typeface Corp.*, 43 F.3d 443, 449 (9th Cir. 1994)  
 8 (affirming district court’s exclusion of evidence under Rule 403 because even if  
 9 evidence was relevant, “it would be prejudicial and confuse the jury.”); *Lifshitz v.*  
 10 *Walter Drake & Sons, Inc.*, 806 F.2d 1426, 1432 (9th Cir. 1986)(district court’s  
 11 exclusion of evidence proper where probative value of the evidence was  
 12 outweighed by the considerable amount of time its admission would consume and  
 13 the confusion it would cause the jury).

14 “Unfair prejudice” in the context of Rule 403 means an undue tendency to  
 15 suggest decisions on an improper basis. Fed R. Evid. 403 ad. com. notes. Improper  
 16 bases include unsupported inferences. *See United States v. Kaplan*, 490 F.3d 110,  
 17 122 (2d Cir. 2007) (concluding that risk of unfair prejudice substantially  
 18 outweighed probative value because the “jury was required to draw a series of  
 19 inferences, unsupported by other evidence...”); *United States v. Ravich*, 421 F.2d  
 20 1196, 1204 n.10 (2d Cir. 1970) (“The length of the chain of inferences necessary to  
 21 connect the evidence with the ultimate fact to be proved necessarily lessens the  
 22 probative value of the evidence, and may therefore render it more susceptible to  
 23 exclusion as unduly confusing, prejudicial, or time-consuming ...”).

24 Courts have consistently found that, even if pending and incomplete PTO  
 25 proceedings have some relevance, they should nonetheless be excluded pursuant to  
 26 FRE 403 because they are “likely to confuse the jury and encourage a decision on  
 27 an improper basis.” *Coryn Group*, 2011 WL 862729, at \*2; *cf. Callaway Golf Co v.*  
 28 *Achushnet Co.*, 576 F.3d 1331, 1342-1343 (Fed. Cir. 2009) (affirming lower court’s

1 decision to refuse to allow evidence of claim rejection in a parallel *inter partes*  
2 reexamination before the jury on the question of obviousness, finding that the  
3 prejudicial nature of the evidence outweighed its probative value).

4 As the *Coryn* court noted, admitting evidence of a pending PTO proceeding  
5 “will likely cause the jury to deliberate on the correctness of the previous fact  
6 finding, rather than retaining the open-minded, first impression approach to the  
7 issues our system prefers.” *Coryn Group*, 2011 WL 862729 at \*2 (citing *Rambus,*  
8 *Inc. v. Infineon Techs. AG*, 222 F.R.D. 101, 110 (E.D. Va. 2004) (internal quotation  
9 marks omitted); *cf. i4i Ltd. v. Microsoft*, 670 F. Supp. 2d at 588-89 (reasoning that,  
10 even if the PTO’s decision to grant reexamination was relevant, “its probative value  
11 is substantially outweighed by its prejudicial effect in suggesting to the jury that it  
12 is entitled to ignore both the presumption of validity and the defendant’s clear and  
13 convincing burden at trial.”); *Pharmastem Therapeutics, Inc. v. Viacell, Inc.*, 2003  
14 WL 22244704, at \*3 (D. Del. Sept. 30, 2003) (finding that an opinion or action  
15 from a quasi-judicial or administrative body increases the likelihood that a jury will  
16 give its conclusions deference).

17 Here, as explained above, there has not been any substantive PTO decision  
18 on the validity or registerability of the BruxZir mark, other than allowance of the  
19 registration for a class of goods. This decision is presumed to be correct, and the  
20 jury should not be invited to speculate that Keating’s Petition for Cancellation, or  
21 its Opposition, have any legal or other tendency to undermine validity or  
22 registerability.

23 In addition to the danger of confusing and misleading the jury, courts have  
24 consistently found evidence of pending PTO proceedings to be unfairly prejudicial.  
25 *Presidio Components*, 2009 WL 3822694, at \*2. In *Transamerica*, a patent  
26 infringement action, the Court granted Defendant’s motion *in limine* to preclude  
27 evidence of the pending reexamination of the patent in question. Reasoning that  
28 “even if the evidence [of incomplete reexamination proceedings] has some

1 marginal probative value, that probative value is outweighed by its potential for . . .  
 2 prejudice[.]" the Court concluded that "there is simply no good purpose here for  
 3 which such evidence could be offered, so that no proper limiting instruction could  
 4 be given." *Transamerica*, 597 F. Supp. 2d at 907.

5 In the instant case, even if evidence regarding the PTO Proceedings has some  
 6 minimal relevance or probative value, which it does not, such evidence should  
 7 nevertheless be excluded because the danger of unfair prejudice and confusion of  
 8 the jury as to the issues substantially outweighs any probative value. Similar to the  
 9 PTO proceedings described in the cases above, which the courts excluded from  
 10 evidence for being unfairly prejudicial and confusing to the jury pursuant to FRE  
 11 403, the PTO Proceedings here are in their earliest stages, incomplete, and pending  
 12 in the PTO, a quasi-judicial body. Therefore, if this Court finds the PTO  
 13 Proceedings to be relevant at all, it should nevertheless exclude evidence regarding  
 14 them because such evidence would be unfairly prejudicial and confusing to the jury,  
 15 substantially outweighing any probative value as to the issues of validity,  
 16 infringement, and damages.

17 Keating's sole purposes in admitting evidence of the PTO Proceedings would  
 18 be to convey to the jury that the validity of the BruxZir mark is somehow  
 19 undermined or weakened merely because Keating has sought its cancellation in the  
 20 PTO. There is a substantial risk that the jury would be confused as to the legal  
 21 import, if any, of Keating's PTO filings, and will draw unwarranted inferences  
 22 about the significance of these filings. In addition, or alternatively, the jury would  
 23 be invited to conclude that it need not take its job seriously, because the PTO will  
 24 ultimately set things right or overrule the jury's decisions. Either outcome would be  
 25 unfairly prejudicial.

26 For similar reasons, admission of the PTO Proceedings as evidence also  
 27 would confuse the issues and mislead the jury. As noted above, the PTO  
 28 Proceedings have no evidentiary value to the infringement and validity issues in the

1 case. Given their irrelevance, admitting evidence of the PTO Proceedings would  
2 only serve to confuse the issues and mislead the jury into focusing on collateral  
3 administrative proceedings, speculating about the legal significance of these  
4 proceedings, and possibly concluding that the PTO ultimately will overrule or  
5 correct the jury's decisions, rather than on deciding the issues based upon the jury's  
6 own assessment of the documentary and testimonial evidence.

7 **C. Evidence of the PTO Proceedings is Hearsay.**

8 Pursuant to FRE 801 and 802, this Court should exclude the Petition for  
9 Cancellation, the Opposition, and other items from the related PTO Proceedings,  
10 because they are hearsay. Hearsay is a statement that: “(1) the declarant does not  
11 make while testifying at the current trial or hearing; and (2) a party offers in  
12 evidence to prove the truth of the matter asserted in the statement.” Fed. R. Evid.  
13 801. Statements in the Petition for Cancellation, the Opposition, and other items  
14 from the related PTO Proceedings, if offered for their truth, are hearsay and they do  
15 not satisfy any of the hearsay exceptions enumerated in the Federal Rules of  
16 Evidence. The Petition for Cancellation, the Opposition, and other items from the  
17 related PTO Proceedings should be excluded from evidence on this additional  
18 ground.

19 **IV. CONCLUSION**

20 For the foregoing reasons, the Court should exclude from evidence the  
21 Petition for Cancellation, the Opposition, and all other filings and PTO actions in  
22 PTO Proceedings Nos. 91202891 and 92056050. The Court also should preclude  
23 any argument premised upon this material.

SNELL & WILMER  
L.L.P.  
350 SOUTH GRAND AVENUE  
SUITE 2600  
TWO CALIFORNIA PLAZA  
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Dated: January 17, 2013

SNELL & WILMER L.L.P.

By: /s/Greer N. Shaw

Philip J. Graves

Greer N. Shaw

Deborah S. Mallgrave

Attorneys for Plaintiff

James R. Glidewell Dental Ceramics, Inc.

dba Glidewell Laboratories

***Glidewell Laboratories v. Keating Dental Arts, Inc.***  
**United States District Court, Central, Case No. SACV11-01309-DOC (ANx)**

**CERTIFICATE OF SERVICE**

I hereby certify that on January 17, 2013, I electronically filed the document described as **JAMES R. GLIDEWELL DENTAL CERAMICS, INC.'S NOTICE OF MOTION AND MOTION IN LIMINE #5 TO EXCLUDE EVIDENCE OF CERTAIN TRADEMARK OFFICE PROCEEDINGS; MEMORANDUM OF POINTS AND AUTHORITIES** the Clerk of the Court using the CM/ECF System which will send notification of such filing to the following:

David G. Jankowski  
Jeffrey L. Van Hoosear  
Lynda J Zadra-Symes  
Darrell L. Olson  
Knobbe Martens Olson and Bear LLP  
2040 Main Street, 14th Floor  
Irvine, CA 92614

**Attorneys for Defendant Keating  
Dental Arts, Inc.**  
Tel: (949) 760-0404  
Fax: (949) 760-9502

Jeffrey.VanHoosear@kmob.com  
David.Jankowski@kmob.com  
Lynda.Zadra-symes@kmob.com  
Darrell.Olson@knobbe.com  
litigation@kmob.com

David A. Robinson  
James Azadian  
Enterprise Counsel Group  
Three Park Plaza, Suite 1400  
Irvine, CA 92614

**Attorneys for Defendant Keating  
Dental Arts, Inc.**  
Tel: (949) 833-8550  
Fax: (949) 833-8540

drobinson@enterprisecounsel.com  
jazadian@enterprisecounsel.com

Dated: January 17, 2013

SNELL & WILMER L.L.P.

By: s/Greer N. Shaw

Philip J. Graves  
Greer N. Shaw  
Deborah S. Mallgrave

Attorneys for Plaintiff  
James R. Glidewell Dental Ceramics, Inc.  
dba GLIDEWELL LABORATORIES

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